

Mark Matthews on IRS Criminal Investigation After the Webster Commission

Mark Matthews is Chief of IRS Criminal Investigation in Washington, D.C.

Kathryn Keneally is a partner at Owen & Davis PC, in New York, New York. Ms. Keneally is chair of the ABA Section of Taxation Civil and Criminal Tax Penalties Committee and is a member of the U.S. Sentencing Commission Practitioner's Advisory Group.

Claudia A. Hill, EA, MBA, is the owner and principal of Tax Mam, Inc., an association of Enrolled Agents in Cupertino, California. Ms. Hill is also the Editor-in-Chief of the Journal of Tax Practice & Procedure.

The following article is transcribed from a special presentation of the National Association of Enrolled Agents Educational Foundation National Tax Education Institute held on July 11, 2001, at the Rio Hotel in Las Vegas, Nevada. Mark Matthews, Chief of IRS Criminal Investigation (CI), was the featured speaker for the over 400 attendees present at the session. NTEI faculty members Kathy Keneally and Claudia Hill joined him. Matthews began his remarks by thanking attendees...

MATTHEWS: First and most importantly, thank you for being here early this morning. I appreciate your getting up. Second, thanks for being in the occupation you are in, performing the role you do for the tax system and the tax compliance system. We realize what a tremendous benefit you are for those of us who are in the tax compliance business and for what you do on a daily basis with your clients. I want to thank you for that.

What I wanted to do today was explore a few areas. I think in most instances we have some common values,—some common objectives. In most instances, we have a lot in common with the practitioner community willing to work with us. I think we all want a tax system that is perceived as fair. We want a system where taxpayers don't believe they are a "chump" for paying their taxes. We want a system where taxpayers can believe they can go to a tax preparer, an Enrolled Agent, a professional in this industry, and not worry they are going to be taken advantage of. And we want

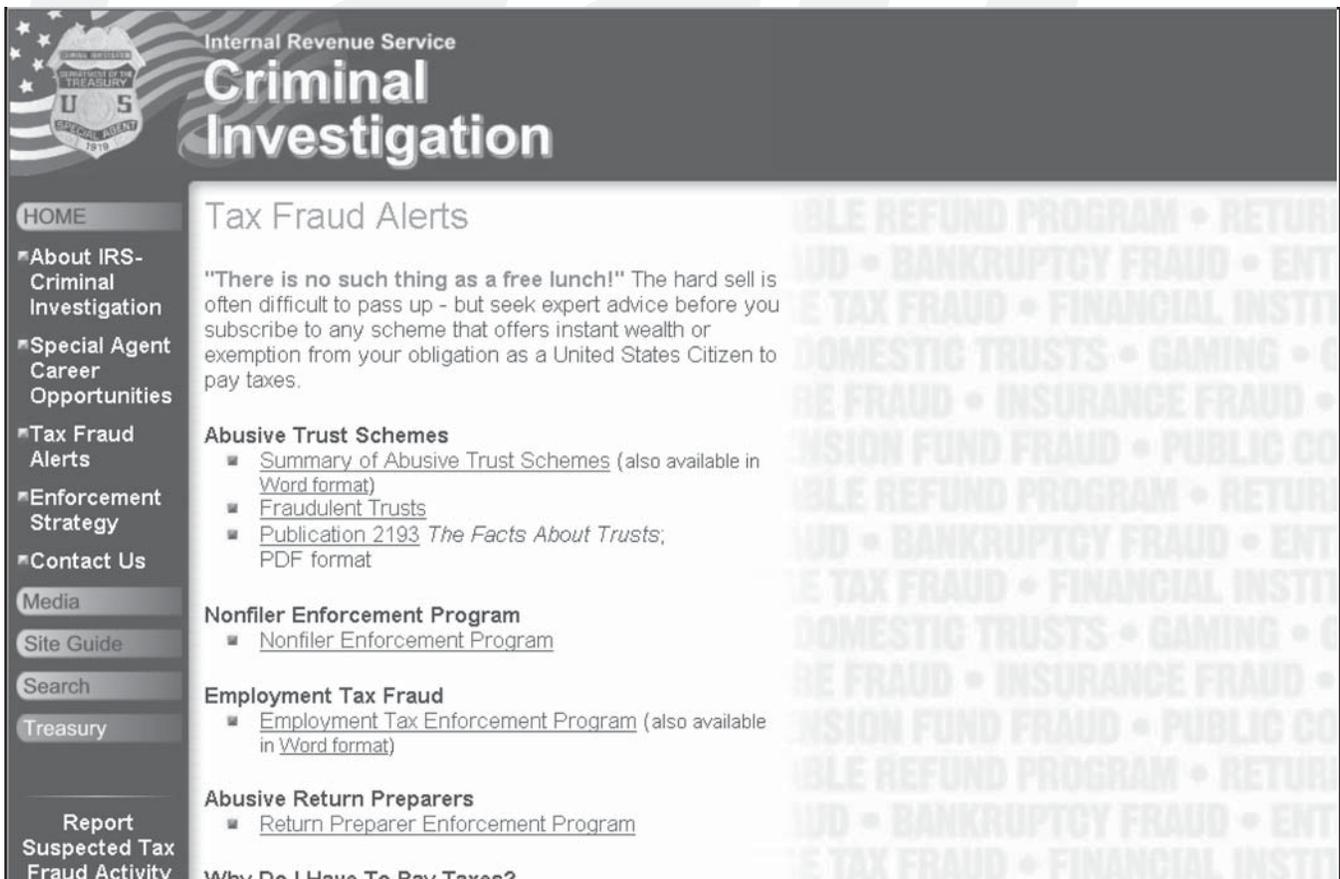
a system where professionals like you do not believe you are at a competitive disadvantage from the unscrupulous folks who are selling scams and cutting corners. I think we have that in common.

So what I would like to do is at least start off with two or three things CI is doing that I think will be helpful to you in your practices. But first, I'd like to tell you a little about what has changed at CI in the past few years. As you may recall, we had a set of congressional hearings a few years ago. Some of those focused on CI. Out of that, we had the "Webster Commission" report. It's available on our Web site. It's about a 140-page document and it had an enormous number of recommendations for Criminal Investigation. Probably the main one was the idea of correcting what the report called "mission drift," referring to the view that over the last 15 or 20 years, CI had moved away from tax enforcement toward drug trafficking and money laundering enforcement. If you look at that report and the things we are talking about today, including the CI Web site we are going to talk about, you'll see that it is all focused on moving CI back to putting a priority on tax enforcement. It was never as dire, I think, as

some perceived it to be. There were a lot of people responsible for where CI was a few years ago, including Congress and the Justice Department. But wherever we were then, we are now in a sustained effort to re-emphasize and revitalize our tax enforcement program, in particular, and the referral process from the operating divisions to CI.

When I came into this job about a year and a half ago, one of the first questions from people in the practitioner community was, "Mark, when are you going to do something about all these trusts we're seeing? They're on the Web. Our clients are coming in and talking about them. We're losing business. It's bad for the taxpayer. When are you going to do something?" At the time, I checked our numbers, and you know we had over 130 open investigations? So I'd ask, "Did you know we had 35 indictments? Did you know the average sentence in one of these cases was between three and four years?" And the answer invariably was "No. Why would you keep that a secret? We could use that information in our practice." And so we went to the Web and have really used it to great advantage. I think Claudia is going to spin through some slides here so you can see what I mean.

Figure 1: www.treas.gov/irs/ci/tax_fraud/index.htm



HILL: Here are two slides to start. One is from the Tax Fraud Alert—a link from the IRS that brings you into the CI site Tax Fraud Alert and the other is a new section that went up yesterday—a return preparers fraud alert!

MATTHEWS: That was not for you!

HILL: Well, the timing of it, Mark. I was a little concerned about that. [Visit the sites at www.treas.gov/irs/ci/tax_fraud/index.htm and www.treas.gov/irs/ci/tax_fraud/docreturnpreparer.htm.]

MATTHEWS: The timing for putting our tax preparer fraud site up was that in NYC on Friday (July 6, 2001) there was a guilty plea for a father/son return preparer who had engaged in a \$35 million tax fraud. They pled guilty as had 18 of their clients. So that had been one of our larger return-preparer cases. We are building our Web site out little by little. But we began with the abusive trust schemes bulletin. What I think would be attractive for a practitioner is that you can go into

this site and see that we begin with a little bit of trust law. We give the five most abusive common domestic schemes. We go over the five most common foreign schemes. We give you real data like the number of current investigations, the number of indictments and the average sentences you get, the average incarceration rate, months to serve. This is portrayed and shared in a way we have not done in the past. We realized that we are missing something and that taxpayers and practitioners are not getting their money's worth from the monies spent on tax enforcement unless they know what we're doing.

To go a little bit beyond that, we have posted significant cases in there. We scrub this rigorously for [Code Sec.] 6103 compliance and for grand jury secrecy and that's why it takes us as long as it does to build some of these pages out. You can go into some of these schemes and see paragraph-long descriptions of some of our cases. In some instances, there will be a hot link below it and you can go straight to the U.S. Attorney's press release that may be a four or five-page document to give you the details.

Figure 2: www.treas.gov/irs/ci/tax_fraud/docreturnpreparer.htm

The screenshot shows the top portion of a web page. At the top left is the IRS logo with the text 'Internal Revenue Service' and 'Criminal Investigation' in large bold letters. Below this is a navigation bar with the text 'HOME : Tax Fraud Alerts : Abusive Return Preparers'. A notice states 'Site was updated on July 13, 2001, to post a significant sentencing.' The main heading is 'Return Preparer Enforcement Program'. Below the heading is a 'Table of Contents' with links to 'Overview', 'Definition', 'Return Preparation and Electronic Filing', 'Tactics Used by Dishonest Preparers', 'Statistical Information', 'Significant Cases', 'Helpful Hints When Choosing a Return Preparer', and 'How to Report Suspected Fraud'. The 'Overview' section is expanded, showing a paragraph of text: 'The IRS Criminal Investigation Return Preparer Program (RPP) was implemented in 1996, and established procedures to foster compliance by identifying, investigating and prosecuting abusive return preparers. The program was developed to enhance compliance in the return-preparer community by engaging in enforcement actions and/or asserting appropriate civil penalties against unscrupulous or incompetent return preparers. This is a significant problem for both the IRS and our taxpayers. Abusive return preparers frequently prepare bad returns for large numbers of taxpayers who, at best, are stuck with paying additional taxes and interest and at worse, depending on culpability, are subject to penalties and maybe even criminal prosecution.'

To me, this lets you know exactly what we're doing and we invite you to use that information with your clients.

KENEALLY: I'd like to give an example because Mark and I tangle over any number of things. That's my job—fighting CI. But, I am most happy when I can meet a taxpayer *before* he or she commits a crime and explain why not to do it. This Web page is an invaluable tool for that. Using the abusive trust Web page, I actually did exactly that. Another lawyer had a client who was wanting to invest, had spent some money, bought the materials and started to fill out the forms and was about to start setting up a series of offshore trusts. He sent his client to me to talk him out of it. Where five years ago I would have spent days pulling together the case law and refuting the arguments—because that's one of the things the promoters do, they are always two or three steps ahead of the case law, so you've got to try to keep up with things—we just sat for 20 minutes and clicked through this Web site and found the answers from CI for each of the arguments.

Here's a story I told Mark when we were exchanging plane stories yesterday: I was making notes on some of the things I was going to talk about during the rest of the week. And a woman sitting next to me looks over my shoulder—I am not kidding!—she said, "Oh, you know something about the IRS? I've just decided I'm not ever paying taxes again." [Laughter]

MATTHEWS: And Kathy wouldn't give me her name! [More laughter]

KENEALLY: No, but I did give her *your Web page*. She said she took a seminar course, they're on the Web, and everything they say makes sense and it's very compelling, and so three weeks ago she stopped her withholding. So I gave her the CI Web page and explained to her that she could go and find all the arguments here that answer them. One of the questions is why you should file. I want to repeat Mark's message: This is something that helps everyone in this room because you are the people who have to answer the seminar people who are speaking to the women like my fellow passenger. I invited her here this morning, too, but she had other plans.

HILL: Mark put into place another very interesting, very proactive tool for people seeking information on tax scams. He understands a little bit how computers search Web sites. So in addition to going to the IRS

Web page for this information, if you were to do a general Web search, for example, using Microsoft Internet Explorer to search for constitutional trusts, not only will you pull up the ones trying to sell you the constitutional trusts, in the top 10 "hits," you'll find one called "*constitutional trusts and pure trusts, worthless trust entities created by the tax protester crowd that won't get you anything but an extended stay at Club Fed. IRS warnings on fraudulent trust introductions.*" Mark has hidden "metatags," those embedded words behind Web sites that trigger what your Web search will retrieve, so that when one searches for (abusive) trusts, they get redirected to the IRS site.

MATTHEWS: Another new addition to our site is an employment tax page, one of our new emphasis areas in the IRS strategic plan. This includes employee leasing entities and some of the scams that are going on now in employment taxes. I was at a panel like this with some practitioners recently, and a fellow came up afterwards and said, "Mark, I just downloaded the employment tax conviction page and made several copies. I keep them in my top drawer and when the clients come in and start talking, I just hand 'em over." Now, if that's happening, we in CI are doing our job. My view is if we're changing the dialogue and giving you the ammunition and material to have a more informed conversation with your client, we are doing our job.

A couple other resources we have on our site: the "Why do I have to pay taxes" tri-fold and "too good to be true trust" tri-fold. These are very popular, nonpractitioner-oriented pieces. Within the next week or so, on this same page we will also have information on reparation tax scams and refund scams. The idea is to be a one-stop shop for consumer fraud and fraud in taxes. The other thing we will be adding to this page is something our Chief Counsel is putting together for us—a more scholarly, legal argument rebutting the vast majority of anti-tax, anti-constitutional, anti-government arguments asserting the system is invalid. That may be useful for you as well.

HILL: Mark, I have a question that always comes up as to *when* CI gets into the picture. Here is an example: Last November, David Cay Johnston in the *NY Times* commented on 23 businesses that had publicly stated they didn't believe in taxes and were not going to withhold anymore taxes. Now, as I said, that was last November. It was very public. And the only response IRS gave was that privacy concerns kept them from discussing it—nothing

condemning the actions, no word from or about CI. In May of this year, California took one of the companies cited in the article that was located in their state, went in, shut them down, locked the door and that was it. Why does it take IRS so long to respond?

MATTHEWS: Well, it certainly takes CI in most instances a longer period of time than it would the SB/SE [Small Business and Self-Employed Operating Division], W&I [Wage and Investment Operating Division] or the other operating divisions. They are able to go in and audit, and I think most of us think that's the right way for most of these investigations to begin. All of us seem to want the instant gratification of seeing people paraded out of their offices in handcuffs on the nightly news, and I might at some level want that as well. But we have built in a number of due process protections before we get to the point of search warrants, handcuffs and jail time. As much as we want the immediate gratification, those of us in this business think we should not yield to those temptations to move too quickly. I think where you will see our involvement is in our return to emphasis on building the best tax cases in the legal source income area. You'll see there has been activity. The operating units have been increasing their audit activity. They have been sending out correspondence. What CI has done is that if you go onto the employment tax Web site, you will see recent convictions of people in the employment tax arena who have argued, who have done the same thing

or argued the same thing as some of the people who were in that newspaper article.

In fact, one of the phenomenons we uncover sometimes is that when you see someone standing out on the street corner selling a product, when CI takes a closer look, we find they're paying their taxes. They're not following their own advice! They know that by standing up they are calling attention to themselves. Therefore, they conform their own tax activities. You may ask what this is all about. It's because they're selling a scam. And they know it's a scam. They know that if they were to participate in it, it would make it easy handle for us to investigate them. I'm not saying everybody's that way, but when you see there is slow action, there may be a lot behind the scenes. We wanted to go on the Web and provide real cases of people convicted of the same behaviors.

I think that in the last year, we've had three multi-million dollar convictions in the employment tax area.

HILL: Here are the most recent ones I found on the Web site (http://www.treas.gov/irs/ci/tax_fraud/docemploymenttax.htm). [See Table 1]

MATTHEWS: I think if you go deeper, there are even more in the last year or two. And one of the things we have pointed out in this area is that because of the pyramiding effect, because of the rapid rate in which the tax loss rises, the jail times can be quite long in these cases.

The federal sentencing guidelines, after someone's been convicted and it's time for the judge to make a

Table 1
IRS Criminal Investigation Employment Tax Evasion Data

During Fiscal Years 1998, 1999 and 2000, nearly 86 percent of the persons convicted of evading employment taxes were sentenced to an average of 17 months in prison and ordered to make restitution to the government for the taxes evaded (plus interest and penalties).

| | Three-Year Totals | FY 2001 (Oct.-July) (10 months) |
|-----------------------------|---------------------------|--|
| Investigations Initiated | 112 | 56 |
| Prosecution Recommendations | 159 | 34 |
| Indictments/Informations | 137 | 29 |
| Sentenced | 127 | 27 |
| | Three-Year Average | FY 2001 (Oct.-July) |
| Incarceration Rate* | 85.8% | 81.5% |
| Average Months to Serve | 17 | 20 |

*Incarceration includes confinement to federal prison, halfway house, home detention or some combination thereof.

sentencing decision, depend most heavily on the amount of tax loss that the person is responsible for. And it's not only their taxes. In the preparer cases, or scam schemes, it's everybody they've caused not to pay taxes. So you can get a multi-million dollar loss to the government, which is obviously of concern to us, but this also results in a multi-year sentence. We are trying to get those stories out. We've got them on the Web. We've got the news out there as best we can. I can't say this is not a frustrating area for us. It's why we put the metatags out. It's to combat speech with more speech of ours. Because we can't look at speech when we bring actions. We look at conduct, not speech. And I think that's what you want us doing.

KENEALLY: I think there are a few points to make in this area because I heard Mark say they can come in on the exam side and look at this more quickly. When someone is under examination they know it. When they are under criminal investigation, they are dealing with the mosquito that doesn't make noise but that bites you in the end. When Mark says they start the investigation, it will take time. I'm one of the people who will make sure it takes time because you want to make sure that the i's are dotted and the t's are crossed. In terms of people's rights, that's important to the system. But when CI comes in, they come in to determine if there has been a crime, to prosecute for that crime and to sentence for that crime. I think that would be the other message that everyone wants to get out about countering what the article in the *NY Times* mentioned and what these people who are speaking publicly about not paying taxes should hear. Once CI decides to investigate, put that out on the Web page, and these people continue to say "fine, we're not paying taxes"; that's not a solvable problem with money anymore.

In the employment tax area, you have a cascading effect because you have levels and levels of taxes that aren't being paid. Those are the numbers that drive the guidelines. I would echo the message that everyone you may be advising should learn that it would be better not to commit the crime. And to the extent that the Service has given you tools to teach with, good for the Service and good for your clients.

MATTHEWS: One of the things we are trying to do is correct the mission drift Judge Webster talked about and to get back in the tax business. We've always been in the tax business, but now we will reemphasize, revitalize the tax business by working more hand-in-hand with the operating divisions. This em-

ployment tax area is an example of where we had drifted apart. If you talked to an average collection agent in this area, they would say, "CI doesn't want to work our cases. They want the instant gratification of drugs and money laundering. They won't work a case like this because I've sent a bunch of referrals and they never picked them up."

We looked at that and we figured out what was happening. The collection agents were looking at and almost reading the statute in a strict liability sense. It was "payroll tax due, return not sent, a few dollars in the bank, straight to jail." They looked at the statute very mechanistically and would send it over and CI, understanding the Department of Justice requirements, said, "No, that won't do it. You need a greedy taxpayer. You need someone who could pay and chose not to." And they'd say, "Well, he has a huge house or he's got a fast car." And we'd say, "Well, when did he or she buy the huge house and the fast car? Was it when they were paying taxes and now their business has failed? Or were they doing that at the same time they were cheating the government? Do they have a foreign bank account? Do they have a bank account in a false name? Is this the third company he or she has done this with as opposed to the first time?" Those are the badges of fraud, the kind of things that set that person out from a regular taxpayer, and from my point of view set that person out so that 12 jurors, each of whom bring a lifetime of experience and experience with the IRS to that jury room, will say, "Here's somebody who went over the line."

Each of the operating divisions has hired fraud specialists; they've been hired for a while and have now finished their thorough training. These 64 fraud specialists do not work for CI. They work for the operating divisions. They are some of the most seasoned revenue agents and collection officers in the operating divisions. And their job (they don't carry a caseload), their job is going to be to work with existing revenue agents and officers to help them understand when they have a case that is really eligible or a good candidate for referral to CI. That's good news in two ways: good news for me more clearly than your clients because we're going to get the right kind of cases. Good news for you and the taxpayers too because the fraud specialists' job is to prevent referrals that should not come to CI. If we haven't got the right kind of case, why should you, why should the taxpayer, have to meet somebody with a badge? Why should they be Mirandized? Why should they go through all that if it's not a case that has criminal potential? It's not efficient for us,

why should we do that? So, that's a brand new feature that we will see rolling out this year and we hope to see some good results from that.

KENEALLY: Here's my concern. On this one I do have some trouble. Earlier I said you could think of CI as the mosquito, the quiet one that bites, and that's sort of underlying what we know about audits. And that if someone is in exam, and if the exam is going forward and if you are interacting with the agent, it's a civil audit. It's when that audit goes quiet that the possibility of a criminal referral should be in the back of people's minds, because you're compelled to file taxes and you're required to participate in the audit. If it has become a criminal investigation, you have your Miranda rights and you have your Fifth Amendment rights. And I've always understood that IRS resolved that by stopping the civil audit until a determination was made as to whether or not to make a referral and make it a criminal investigation. I'm concerned now if you have someone who is there at exam teaching the revenue agent how to ask the right questions to determine whether or not it is a fraud. Where are the protections? Or should we now be more worried about exam?

MATTHEWS: I think this is in some sense not that much different from what existed and was more effective a few years ago. There have always been fraud coordinator positions within the operating divisions, within examination. They were not CI employees. All of this is designed to answer the question you pose, "Is this a fraud case?" Yes—it is designed to assure the right questions are asked so the examiners can determine whether this is a case that has potential as a fraud referral. But all the normal internal IRS procedures come into play once those firm badges of fraud have been identified, once there is an institutional commitment to refer the case. All the legal protections still exist. Those people know and have been trained. The people cannot operate or investigate at the behest of CI, as an arm of CI, because of all the legal protections. At that point, you are right to say that it goes quiet for a while. The questions may stop for a while. You will get the same signal there. The next signal may be a grand jury subpoena or it may be an administrative summons with a special agent's name on it. A lot of this will appear the same or be the same. What I'm saying is that we're going to do a more effective job of something we've always done.

KENEALLY: What I'm hearing today is coming as news that there's going to be more attention at exam. And I can respect that, if I hear there are going to be safeguards. I'll watch and see and if there are not safeguards, I'll tangle with you then. But it's been my experience that at exam, especially since the Congressional hearings, the folks are gun-shy and they haven't been aggressive. I think the message we are hearing now is that if there's a taxpayer under examination who's got problems, somebody's going to be looking more closely for fraud on that return. And the possibility of referral has increased.

MATTHEWS: That's what the plan is put into place for. In fact, there had been some anecdotal stories of gun-shy revenue agents who actually believed they would be investigated if they made a referral. Now there will be a second set of eyes, a second set of responsibilities on making that referral to CI. And frankly, the lawyers in Chief Counsel have volunteered, if the revenue agent, officer or that fraud specialist want to come into a lawyer, to be a third set of eyes on that judgment. They're available for that as well. The idea was candidly to buck up and give some support to some revenue agents and officers out there who may have misread their responsibilities in [IRS Restructuring and Reform Act of 1998 (P.L. 105-206) Sec.] 1203 and the like. For instance, it used to be a bureaucratic negative if you made a fraud referral from the exam side because the managers were measured on something called "cycle time." You all know this better than I, but they kept track of how long they had a case out. And when you sent it to CI—talk about long investigation times—the manager's statistics suffered. We have eliminated cycle time for fraud referrals.

Now, remember we are not giving awards for specific fraud referrals. We are in that environment post those hearings. No one gets promoted and no one gets an award because of fraud referrals. We are very careful about that. We may recognize someone after two or three years for participation in an effective fraud referral program, but we are very careful that this whole thing does not come out as any sort of bounty program.

The whole Web-based approach and the publicity that we are getting has a message to those agents, and our special agents as well. A lot of them were seeing their cases winding up in the Metro section of newspapers because the reporters would say, "Well, you convicted a doctor" for example. "He pled to two instances of filing a false return and that's a Metro

story.” What we did with this whole Web page is that we gave the reporters much more background information. They now have the information of how many billions of dollars this fraud is costing us. What percentage of healthcare providers are involved. We’re starting to get that information to the reporters and the reporters are saying, “Now you’ve got a story!” It’s not about the doctor in the next town over who pled guilty. It’s about a compliance problem in America. It’s about a multi-billion-dollar problem in our country. It’s about something the government, specifically the IRS and the Justice Department, is doing about it. That’s now a story that should go on the front section. We’re seeing our stories get better placement and put in a better overall context. That’s a message to those revenue agents and collection agents that there is a value in making an appropriate referral, not an inappropriate referral. Not one that’s not going to be pursued, but making a referral that has that sort of potential that it rolls back and helps in compliance, in a way unlike an audit that will be kept secret. So we think we’ve put together a pretty good integrated package here.

HILL: You know, Mark, I’m starting to get this uneasy feeling. [Laughter]

MATTHEWS: That wasn’t the idea here. [Laughter]

HILL: The past two years our organization has tried to keep people interested in representation, even though there has been very little to do because there have been so few audits. Even in the collection area, there was very little going out. There was such a lack of IRS presence in the compliance field that we’ve testified several times that the honest taxpayer needs to know that there are consequences to noncompliance. Now is this going to turn into one of those “be careful what you wish for” things?

MATTHEWS: No, no.

HILL: In our exhibit area are recruiters for both CI and regular field functions. In the area where I live, IRS has already announced that by October they will have 21 new revenue agents.

MATTHEWS: No—you’re talking about a very small percentage of the audit activity that’s going to come to us. Look, the number of fraud referrals had been driven down to a level that was just amazingly low. And we’re talking about a phenomenon that has hap-

pened over the last four or five years. So CI is a small, small portion of the overall compliance activities.

Remember, the vast majority of the American public pays taxes honestly. Of the noncompliant, I think the largest component is the people who are maybe confused, do not know, make a mistake. It is, in fact, a relatively small segment of the American taxpaying public who is deliberately, willfully, intentionally on a multi-year basis getting up and deciding “I’m not going to pay my fair share today.” That is a small segment. We in CI are focusing our attentions only on that very small segment and that winds up being a very small percentage of the audit activity as well.

What you are seeing, on both the audit side of the house and the criminal side of the house, is an effort to redress some staffing drops over the last few years. That’s much more responsible for what you’re talking about in the lack of audit activity. It was a budgeting matter and who was simply there and trained and being able to do those audits, who was not being pulled off for instance, for filing season duties. That was what you were seeing—lower audit rates because of those kinds of phenomenon occurring in the IRS. That’s what we’re trying to put back together. Clearly, the vast, vast majority of the work can be handled successfully through civil audits and attention. We’re there for that fortunately still very small percentage of the American population who are about something different.

HILL: Mark, on the CI Web site you have something about a Nonfiler Enforcement Program. We teach preparing tax returns for what I like to call the “late filers” because when they get to us, they can be very late, but they’re not going to be nonfilers anymore. For those people who are going to be taking that course, sometimes when it’s taught from the perspective of the attorney, we’re told that EAs can’t do delinquent returns because they could be a criminal case and nonattorneys should be very careful when dealing with such taxpayers and their returns. But in my experience, 99.9 percent of the time the nonfilers/late filers are people who have had traumatic events that caused them to just get behind. The program that you have up on the Web site—Nonfiler Enforcement—isn’t talking about that 99.9 percent, is it?

MATTHEWS: No. You’ve heard IRS has a nonfiler program and something called “making a voluntary disclosure” and all that. That’s not what our Web site is about. One of the nice things about our site is that when you use it to start pulling the actual nonfiler case summaries and reading the kind of cases that

we have selected, you get a sense of what CI is talking about: that multiple-year event. And remember when you start looking at those cases you'll see we're thinking about 12 jurors. If it's a situation that you're talking about—a traumatic event in someone's life—the bottom line is that doesn't have any jury appeal. It's not the kind of noncompliance we're looking for. There are enough criminal nonfilers out there. Traumatized taxpayers are not something where CI wants to orient its activities. You're correct to be alert; and you're right to get those people back into the system because what you do see sometimes is that an initial event that may have been understandable for a single year late may begin to pyramid. There are cases on the Web page where what may have been in the first year not a criminal matter develops into a criminal matter because of the amount of time that's gone by. They get over the event, they get their finances back in shape and they still don't file. You will see that. But by and large, read those cases and you'll get a sense of where we are oriented in the program.

KENEALLY: It is a crime not to file a tax return on time and I don't think Mark can sit here and say it's not a crime if you file it late. But it's my experience—and I have a lot of experience here—and if it's legal source income and if the Service has not started an investigation, file the returns. There are times you might want to have an attorney looking over that return for any of a variety of reasons. There are riders that you might want to be put on that return to explain why it was late, maybe to mitigate against penalties, and sometimes there are tricky questions in how you reconstruct. If you have a nonfiler, you often have a bad record keeper. You've got other issues out there. Or you still have that event that triggered the nonfiling, keeping that person from getting their entire picture together. But I've never known them to be cruel in this area.

MATTHEWS: That's on tape. She said in other instances we were cruel, but not in this area. [Laughter from audience]

KENEALLY: There are other trigger events beyond just legal source income and the Service has not started an investigation yet. If you have a case that goes beyond that, yes, I've seen the Service take harsher positions. I've seen CI take harsher positions. And then I think the message that people are hearing is that there should be a lawyer looking at the situation. The advice I routinely give is that failing to file a

tax return is a continuing state of sin and that somehow you have to find a way to get into compliance. Even if it's a Fifth Amendment return or something. You have to find a way to get into compliance. But the nonfiler program is not the one that should frighten people into coming back into the system.

MATTHEWS: What you see in many of those cases is evasion-like activity. In fact, that is a frequent occurrence in the nonfiler cases we bring criminally. But for whatever reason, the affirmative acts of evasion may not meet the standards of proof—beyond a reasonable doubt—for 12 jurors. You can see that some of these cases began with evasion in mind, but at the end of the day, the nonfiling charge was the most efficient and appropriate mechanism to go forward. So if you are concerned about this area, go look at the cases. Another nice thing about this Web page is that in many instances these are nonreported cases because many of them are guilty pleas so they don't get reported in the system.

Let me give one more advertisement for what we're doing here: We have an over 95 percent conviction rate in our legal source tax program. Someone from DEA or FBI would talk about a high 80s or high 90s conviction rate as well, but I think this is an extraordinary accomplishment when you're in the tax system. Remember, we're dealing with 12 jurors who are bringing their own experience with the IRS. As a former Assistant U.S. Attorney, it was one thing to bring the cocaine bales to set along the jury rail during the closing arguments and they were ready to vote. It's a different thing to open with "I'm so-and-so and I'm here with Special Agent so-and-so of the IRS." You don't get the wave from the jury. They approach that case with a "prove-something-to-me-here-today" attitude. The fact that we're convicting with over 95 percent is a message to us—we certainly view it that way—that we are, by and large, selecting the right cases. We are picking cases where 12 jurors with diverse backgrounds are saying, "This was beyond the pale, and this was not something where I can identify with this taxpayer."

Now, I am always hesitant when we talk about conviction rates. It's not even a figure we give out to local districts; it is not something we do appraisals on. That is a figure that, under the new rules, is only monitored at the national office because we are so concerned about sending any kind of a message that we're into a bounty or that a conviction is the only result. We don't even count cases that get referred to the justice department for prosecution. What we count are concluded investigations. And

a concluded investigation may be a discontinued investigation—no referral to the justice department. That investigation counts the same as one that gets referred and gets sentenced to a big jail time. I want to mention this caveat when I start talking about something like conviction rates, because that's not the way we're operating internally.

HILL: Mark, yesterday, or the day before, a new segment to your Web site went up called "Abusive Return Preparers" and featuring the Return Preparer Enforcement Program. [www.treas.gov/irs/ci/tax_fraud/docreturnpreparer.htm] I think that's an area—return preparation—that's dear to most of the people here. Please tell us why it's there and what the site is all about.

MATTHEWS: Well, I think that's an area where when you look through the kinds of cases we've featured, you'll understand why it's there. I hope we have the Justice Department press release up in a case just this week, where a tax preparer in Spring Valley, New York, was sentenced to 51 months in prison followed by 12-months supervised release and ordered to pay a \$50,000 fine. The preparer was convicted of 43 counts of aiding and assisting the filing of false tax returns.

Remember my same points about case selection: the kind of evil purpose, bad motive that we think we're able to find, investigate and prove to a jury. As hard as it may be to believe, there are some return preparers who have gotten into the same attitude of getting up every day on a multiple year basis and deciding to play the system, to game the system and, in many instances, to harm the clients. You'll see some of these cases where the clients were completely innocent, didn't realize that certain amended returns had been filed, that the second page they had signed was attached to a different return when it was filed, that refunds got derailed and got put into the return preparer's pocket. When you look through the kinds of cases and what you see there, I don't believe most of you in this room will think we've skated into an area that you would disagree with or think is dangerous. I think this is, in fact, a common value we have.

If we weren't out there paying some attention to the unscrupulous ones, the shysters, if the public got the impression that if you go in and talk to a tax preparer, you may be scammed and not even know it, you may be inadvertently pulled into a criminal case and charged yourself. Again, most taxpayers operate within the system and don't want to cheat; they want help in filing an honest and accurate re-

turn. If the public comes to believe that someone that has a shingle hanging out may be part of the problem instead of part of their solution and not a good compliant firm, then I think that's as much a problem for you as it is for us.

HILL: We can go with the idea of not losing business to the shysters. I also noticed a spot on that site on how to report suspected fraud. I know that almost everyone in this room has had the experience of someone coming into their office and saying "well, the guy did it for me last year" [laughter] or they say as they leave, "Now that I know the questions to be asked, I'll be better prepared when I go to the next preparer." Maybe referring people to your Web site will be a help for us.

MATTHEWS: There's an 800 number to report the suspected fraud [1-800-829-0433]. Or, you can mail the information to your local IRS office if you want to. We have in the audience Byram Tichenor who is in charge of our Las Vegas office, and there are special agents out in the booth outside. The 800 number is not manned by CI agents. There are just too many calls and candidly too few of a percentage of them are good leads. A lot of divorce calls with, "You can't believe what he's doing!" [Laughter]. Not to say that these aren't some of our best cases. There's nothing like that or like a business that's breaking up.

A lot of people aren't accurate "self identifiers" of what is a fraud case. So that number is available, but you may want to mail your report to us. You may be much more seasoned and savvy about this, so you may want to identify the special agent and send something in the mail. Now, don't get me wrong; a lot of people want immediate news back. We both may want them in handcuffs. It's the same story we started out with; you want to see immediate action. That's very difficult for us to get back to. We get a lot of mail. I know it can be frustrating. We may be working that case. It may take two or three years. We may decide an undercover operation is in order as opposed to what we're able to find overtly. And until and unless that becomes public, we're unable to give you assurance even that it's being worked. That in itself would be a violation; for us to even say to you, "We're working that case." So I warn you. We appreciate those sorts of tips but I can tell you're not going to receive your own version of instant gratification. But I think you can rest assured that you've put it in the right hands and, with any luck, assuming we have the staffing time, and it worked out and it's not over the top in terms of what they can do in that region, we'll be able to work that case for you.

KENEALLY: I would like to turn for a moment to the return preparer page and the nonfiler page and give everyone some free advice here because I can't resist. The IRS/CI can't go after every taxpayer any more than a police officer can go after every speeding car. They look for general deterrence impact. One of the reasons why you're seeing a return preparer page is because that's a way of general deterrence. Those are the cases that are going to make the newspaper; those are the cases that are going to affect not just that defendant, that target, but the people who are getting advice from him. That may be one of those factors that triggers nonfilers to move from civil to criminal because it's something more than just legal source income and the Service did not start the investigation yet. There's some shot that there's somebody in this room who takes good care of his clients but who has fallen behind. Please file your returns because you're good deterrents if you get caught.

HILL: I wanted to remind everyone that there is one more area that we deal with every filing season in which CI is involved: the Earned Income Credit (EIC). EIC fraud is an amazingly huge, huge amount of money each year. CI gets involved in that too.

MATTHEWS: Yes. We have, in fact, a separate appropriation through Congress. This is an area Congress is very concerned about, so it will remain an emphasis area. In the strategic plan this year, there are three major emphasis areas: one is trusts, both foreign and domestic; the second is the employment tax area we've been talking about; the third is the nonfiler. And even though the EIC cases are not nonfilers, some of that money falls within the nonfiler program. So by saying those are the three emphasis areas, don't think we've given up on the return preparer program and EIC. The Service has done an enormous amount of education over the last few years trying to help the majority of the people who are trying to file correctly, and especially those with practitioners' help.

When you look at the cases we bring, you'll find multiple-year cases or the purchasing of Social Se-

curity numbers. We like to think we've picked some pretty blatant examples. We're out there. We'll be out there again in the next filing season as well. And we'll continue to use the undercover program in this area, so you're correct to point that out.

HILL: Last comments, Kathy? Mark?

KENEALLY: I think there's a very positive message here, and a warning. I always come at the world with an attitude that I want to see the tax system work and that my individual client, *the most* sympathetic person who just made some unfortunate mistakes, and I want to protect that person within the system. Mark's message is clearly that the system is working more effectively and I think that's generally good news. But the warning is to watch out because they're there. And when audit goes quiet or when somebody comes and says, "This is what I've been told to do and this is the scheme I'm following," get your clients back on the right course because CI is back in business.

MATTHEWS: If I can give a 20-second advertisement here, we do have the CI recruitment table out in the exhibit area. It may not be something that appeals to you or you may be set in your career. There's also an age 37 cut-off that gets one or two of you in this room [laughter]. But it's an exciting career. We're off doing great work; we're entering a brave new world of computer forensics where there are electronically filed returns without signatures. Learning how to prove those cases is a challenge. We have an international angle, what we've talked about with the Internet and trusts, foreign trusts. The tool kit you get through a career as a special agent is great. There are some early retirement opportunities. I don't want to talk about early retirement with any of my people in the room because I want them to be staying as long as they can. It's a pretty great career. We're looking to improve our diversity. We've had some success with women in particular. But it may not be you—it may be a niece, a nephew, someone graduating from college with an accounting degree. Just keep us in mind. That's all I'd ask.

This article is reproduced from the *Journal of Tax Practice and Procedure*.
To order or get more information about this bimonthly publication,
call 1 800 449 8114 or visit tax.cchgroup.com